

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

STEPHANIE PATRICK

Claimant

VS.

FAMILY LIVING, INC.

Respondent

AND

TIG INSURANCE COMPANY

Insurance Carrier

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Docket No. 250,840

ORDER

Respondent appeals the review and modification Award of Administrative Law Judge Bryce D. Benedict dated July 20, 2004. Claimant was found to be permanently totally disabled as a result of injuries suffered with respondent on September 1, 1999. The Appeals Board (Board) heard oral argument on January 11, 2005.

APPEARANCES

Claimant appeared by her attorney, John J. Bryan of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Thomas R. Hill of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

- (1) What is the nature and extent of claimant's injury and/or disability?
- (2) Has claimant proven a change of circumstance which would justify a review and modification of the original Award of September 30, 2003, wherein claimant was awarded a 5 percent permanent partial

impairment to body as a whole on a functional basis and an 18.4 percent permanent partial general disability as a work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant suffered accidental injury on September 1, 1999, when, while assisting a disabled resident in a home care situation, she suffered injury to her low back. Claimant underwent treatment, returning to work for respondent in an accommodated position. An original Award was issued in this matter on September 30, 2003, by Administrative Law Judge Bryce D. Benedict, at which time claimant was awarded a 5 percent impairment to the body as a whole on a functional basis, and an 18.4 percent permanent partial general work disability. At that time, the Administrative Law Judge (ALJ) found that claimant had abandoned accommodated employment without cause and but for that, she would be employed. Based on that, the ALJ imputed a wage of \$245, which, when compared to her average weekly wage of \$291.01, resulted in a wage loss of 15.8 percent. He also found claimant to have suffered a 21 percent task loss based upon the opinion of board certified orthopedic surgeon Edward J. Prostic, M.D. This matter was appealed to the Workers Compensation Board and, in its decision of April 20, 2004, the Board affirmed the ALJ's award.

Claimant filed a post-award application for medical treatment, requesting both ongoing medical care and the reimbursement for the cost of certain prescriptions provided by her family physician to be paid as authorized medical treatment. The ALJ, in denying claimant's request, found claimant to not be a credible witness. He went on to state that claimant's allegations were "embarrassingly unconvincing and that she has failed to meet her burden of proof by a wide margin."

Claimant then proceeded to file a request for review and modification on December 22, 2003, which was heard by the ALJ on May 6, 2004, with the July 20, 2004 Award being the ultimate result of that hearing.

Claimant's work history is sporadic at best. It is obvious that prior to working for respondent, she had a very minimal work history, earning, at most, \$2,650 a year during the years prior to her employment with respondent. Claimant has been diagnosed as mildly retarded, with an IQ in the low 70 range. It is acknowledged that claimant's ability to obtain work in the open labor market is limited due to her limited mental capacities.

Respondent's assisted living situation, however, dealt with more severely retarded individuals, utilizing claimant in helping to care for these individuals.

At the time claimant was hired, respondent advised her that there were certain requirements, including that she have a valid Kansas driver's license. Claimant advised respondent on March 19, 1999, that she did not have a valid Kansas driver's license, but anticipated obtaining same within approximately two months. No valid Kansas driver's license was produced, and, in a letter dated June 21, 1999, respondent's executive director, Victoria Washington, advised that they were considering suspending claimant due to the lack of requested documentation. Paula Noyes, respondent's director of medical support services and a registered nurse, testified that while that letter was provided claimant, there was apparently no follow up with regard to the suspension.

Claimant suffered an accidental injury on September 1, 1999, after which time she missed a considerable amount of work. It is unclear from the record exactly when claimant returned to work, although, by July 14, 2000, claimant was working. However, between July 14, 2000, and August 11, 2000 (claimant's last day worked with respondent), claimant only worked all or part of eleven days. There were several instances when claimant worked for a few hours and then went home early. On August 11, claimant left early to enroll her child in school and then, for the next three years, called respondent every day from Monday through Friday (based upon the advice of her attorney), advising that she was in too much pain and would not come to work. Claimant did not again actively seek employment until spring 2004.

Several letters were provided to claimant from Ms. Washington, advising that several pieces of documentation were required before claimant could return to work. It is acknowledged that initially in October of 1999, respondent advised claimant that it was unable to meet her restrictions. However, by June 22, 2000, respondent advised claimant by letter from Ms. Noyes that accommodated work was available, but that claimant was to bring her updated CPR certification, driver's license and driver's record before returning to work. This same request was echoed in subsequent letters from respondent to claimant, but the information requested was not provided until sometime after October 9, 2003, at which time claimant provided the CPR training certification and driver's record information, but she was still unable to produce a valid Kansas driver's license. Claimant's driver's record, which was placed into evidence at Paula Noyes' deposition, displayed numerous convictions for various traffic citations, including failure to provide appropriate insurance, driving on a revoked license and driving on a suspended license. By the time the driving record was provided to Ms. Noyes after October 9, 2003, claimant's license had been suspended until at least November of 2006. Respondent, at that time, terminated claimant's employment.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.¹

¹ K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

K.S.A. 44-528(a) states in part,

Any award . . . may be reviewed by the administrative law judge for good cause shown upon the application of the employee The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds . . . that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.²

The Kansas Supreme Court has interpreted K.S.A. 44-528(a) to require evidence of a change in a claimant's condition before an award may be modified.³

Any modification is based on the existence of new facts, a changed condition of the workman's capacity, which renders the former award either excessive or inadequate.⁴

The party asserting the change of condition has the burden of proof.⁵

Here, there is no evidence that claimant's functional impairment has changed, and the original award of a 5 percent impairment to the body as a whole remains.

Claimant argues, however, the fact that she has been terminated from her employment constitutes a change in claimant's work disability condition. For a September 1999 accident, the legislature defines work disability as:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to

² K.S.A. 44-528(a) (Furse 1993).

³ *Coffman v. State*, 31 Kan. App. 2d 61, 59 P.3d 1050 (2002).

⁴ *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978).

⁵ *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 527, 598 P.2d 544 (1979).

90% or more of the average gross weekly wage that the employee was earning at the time of the injury.⁶

In this instance, claimant was initially advised that a driver's license was a requirement for employment. Claimant advised respondent on March 19, 1999, that she would have her driver's license within approximately two months. When this was not forthcoming, a proposed suspension letter was issued by respondent dated June 21, 1999, advising claimant that her employment was possibly going to be suspended due to her failure to provide the documentation. However, it is acknowledged this action was never followed up on, and Ms. Noyes was unable to explain why. Claimant was advised on several follow-up occasions, in letters from Ms. Washington, that certain documentation was required for her to return to work. The Board agrees that respondent had accommodated claimant, allowing her to work without the driver's license, through August 11, 2000. Ms. Noyes acknowledged this was an accommodation and not strictly in keeping with respondent's policies.

Claimant's refusal to return to work after August 11, 2000, obviously negatively affected the ALJ in the original Award, when he found that claimant had "abandoned accommodated employment without cause and but for that she would be employed today."⁷ The Board agrees that claimant's actions, rather than supporting an attempt to return to work, seem to be intent on accomplishing the exact opposite. Even though work was available, claimant refused to return to work, using ongoing pain complaints as the excuse for over three years.

Finally, when claimant did ultimately attempt to return to work, she provided only a portion of the documentation requested by the employer. Claimant failed to provide the driver's license, which respondent had advised her was necessary for her to continue in the accommodated employment. This lack of a driver's license was clearly created by claimant's own actions. Her driving record showed numerous occasions of driving without insurance or on a suspended or revoked license, resulting in longer and longer suspensions of her legal right to drive.

When looking at claimant's entitlement to a work disability under K.S.A. 1999 Supp. 44-510e, the Board must consider the policies set forth in *Foulk*.⁸ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability by refusing an accommodated job that paid a comparable wage. In such a situation, the

⁶ K.S.A. 1999 Supp. 44-510e(a).

⁷ Award (Sept. 30, 2003) at 4.

⁸ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

court would act to prevent a claimant from refusing work and exploiting the workers compensation system.⁹

The ALJ awarded claimant permanent total disability, finding that for claimant to become re-employed would be extremely difficult and the Judge “cannot conceive of an employer so desperate for workers that it would hire someone such as the claimant.”¹⁰ The Board acknowledges that claimant’s low functional mental capacity, her poor work history and her limited transferrable skills could place her in a position where she would be extremely difficult to employ. However, in this instance, respondent appeared willing to accommodate claimant’s lifting limitations and even, for a period of time, her lack of a driver’s license, apparently based upon claimant’s assurance that, at some time, she would obtain a driver’s license. However, claimant, on the other hand, appeared to do everything in her power to ensure that she would not return to employment with respondent, calling in for over three years and refusing to work due to alleged pain.

Additionally, the documentation, first requested by respondent in 1999, was not provided until after October of 2003 and, even then, it was incomplete. The Board finds that claimant’s actions in this instance do not constitute a good faith effort to retain her employment with respondent, but were instead intended to accomplish the exact opposite. The Board, therefore, finds based upon *Foult*, that claimant is not entitled to an additional award beyond that granted in the original September 30, 2003 Award, as she has not shown a good faith effort to retain employment with respondent. The Board does not find claimant to be permanently totally disabled, just extremely limited in her options, which, in this instance, claimant aggravated by her own actions.

The Board, therefore, finds that the Award of the ALJ granting claimant permanent total disability should be reversed and the original Award of September 30, 2003, should be reinstated and claimant awarded a 5 percent impairment to the body as a whole on a functional basis, and an 18.4 percent permanent partial general disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the review and modification Award of Administrative Law Judge Bryce D. Benedict dated July 20, 2004, should be, and is hereby, reversed, and the Award of September 30, 2003, should be, and is hereby, reinstated and the claimant is awarded a 5 percent permanent partial general disability on a functional basis, and an 18.4 permanent partial general work disability, stemming from the injuries of September 1, 1999.

⁹ *Foult* at 284.

¹⁰ Award (July 20, 2004) at 3.

Claimant is awarded 35.86 weeks of temporary total disability compensation at the rate of \$194.02 per week totaling \$6,957.56, followed by 72.52 weeks of permanent partial general disability compensation at the rate of \$194.02 per week totaling \$14,070.33 for an 18.4 percent permanent partial general disability, making a total award of \$21,027.89. As of the date of this award, all amounts are due and owing, and ordered paid in one lump sum minus any amounts previously paid.

In all other regards, the Award of Administrative Law Judge dated September 30, 2003, should be, and is hereby, affirmed. Additionally, the Board awards additional reporters' fees to be assessed against the respondent and its insurance carrier to be paid as follows:

Hedberg & Foster Reporting, Inc. Post Award Hearing - May 6, 2004	\$240.00
Metropolitan Court Reporters Deposition of Paula Noyes - June 24, 2004	\$409.70

IT IS SO ORDERED.

Dated this ____ day of January 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

We respectfully disagree with the majority's decision to continue to impute the wage to claimant of the job with respondent. In the original award, the Board imputed that wage because respondent represented that the job was available and claimant failed to make a good faith effort to do the accommodated job. Following the Board's Order, claimant attempted to return to work, but was refused because she did not have a driver's license.

Good faith is required of both the injured worker and the employer.¹¹ Just as an injured worker is required to act in good faith in responding to an offer of an accommodated job, an employer is obligated to act in good faith when making that offer.¹² A claimant is required to attempt an accommodated position that is within the worker's restrictions and to make a good faith effort to perform that job.¹³ In the original award in this case, the Board unanimously held that claimant failed to make a good faith effort to return to the accommodated job with respondent. Now, post award, claimant attempted to return to that job, but was terminated for not having a valid driver's license. Although driving patients was a job duty for some of respondent's employees, it was never part of claimant's job duties. Moreover, driving patients was not listed as one of the job duties of the accommodated job. The undersigned Board Members would find that it was not reasonable for respondent to require claimant to have a driver's license before she could return to work in an accommodated job when that job did not require driving.

Absent the accommodated job with respondent, the evidence is overwhelming that claimant is realistically unemployable. We would affirm the Administrative Law Judge.

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Thomas R. Hill, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

¹¹ See *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999); *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997); *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

¹² See *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001); *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000); *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999); *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

¹³ See *Cavender v. PIP Printing, Inc.*, 31 Kan. App. 2d 127, 61 P.3d 101 (2003); *Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 59 P.3d 352 (2002); *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).